was admitted by the plaintiff in evidence that the police offerred to return the vehicle to him although the police must have known that the car was hired to him on a hire-purchase agreement, but he refused to accept the offer and instead took action to terminate the agreement and claimed for special and general damages. It is apparent that only after the plaintiff had refused the police offer that the car was released by the police on a bond to the finance company. Having refused to accept the car in the first instance, I find the plaintiff's argument that the conditions imposed on the finance company in the police bond are inconsistent with the plaintiff's rights under the Hire-Purchase Act to be untenable. It should also be borne in mind that the present case is not one where a finance company was the owner of the motor car let it out on hire-purchase. There is no evidence here that the finance company's title to the Morris car was defective in any way. In my judgment, the fact that the car was detained temporarily for purpose of police investigation on suspicion — which turned out to be unfounded — did not affect its title. Although the car was detained by the police on suspicion, it is not in dispute that the vehicle had now been proved to be not stolen and the conditions in the bond withdrawn. The question as to whether the finance company was in a position to transfer the car when it was under police investigation is merely hypothetical as it is based on two assumptions, viz. that the finance company was not in fact the owner of the car and that the plaintiff had exercised his option to purchase. As stated earlier on, in the present case, there was no evidence that the Morris car was a stolen vehicle and nor was there evidence that the plaintiff had exercised his option to purchase. There can only be a breach of section 6(1)(b) of the Hire-Purchase Act if "at the time when the property is to pass" the finance company had no right to sell the car to the plaintiff. Under the circumstances of this case, I do not consider there was any fundamental breach entitling the plaintiff to terminate the hire-purchase agreement. Whatever damage suffered by the plaintiff was directly caused by police investigation and by the plaintiff's own action in refusing to accept the car from the police. As stated by the learned Senior President in his grounds of judgment, in all the six cases cited by counsel for the plaintiff, the offence or infringement which rendered the purported passing of title voidable was established to the satisfaction of the court. There was indisputable evidence in this case that the Morris car was not in fact a stolen vehicle and as such there could be no question that the title could not pass to the plaintiff under section 6(1)(b) of the Hire-Purchase Act or under section 14(a) of the Sale of Goods (Malay States) Ordinance, 1957, at the time when the property is to pass.

For the reasons which I have stated, I accordingly dismiss the plaintiff's appeal with costs.

*Appeal dismissed.*

Solicitors: *Rithauddeen & Aziz; Khoo & Sidhu; Chye, Chow, Chung & Tang.*

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## BUILDING SOCIETY OF MALAYA LTD. v. JOSEPH MICHAEL

**[O.C.J. (Mohamed Azmi J.) October 29, 1971]**

**[Kuala Lumpur — Originating Summons Nos. 357 of 1968 and 102 of 1972]**

*Practice and Procedure — Application to set aside formal order — Slip rule — Inherent jurisdiction of Court — Interest — Period for which chargeable — Rules of Supreme Court, Order 28 rule 11.*

In this case an order had been made for the sale of land charged to the chargee. The chargor applied to have the order set aside under the inherent jurisdiction of the court, as it did not correctly express the intention of the court. The order in this case had been approved by the then solicitor for the chargor. The order provided for payment of interest but did not specify for what period the interest should be chargeable. The chargee applied for interpretation of the order concerning the period during which the interest was payable.

**Held:** (1) the fact that the formal order was at variance with the court order did not make it null and void; it was only an irregularity which could be cured under Order 28 rule 11 or under the inherent jurisdiction or the court;

(2) in any case the chargor had failed to show that the order as extracted in this case did not correctly express the intention of the court;

(3) the interest ordered should be payable until the date of realization, that is the date of sale.

*Cases referred to:-*

(1) *Macfoy* v. *United Africa Co. Ltd.* [1961] 3 All E.R. 1169.

(2) *Craig* v. *Kanseen* [1943] 1 All E.R. 108.

(3) *Riches* v. *Westminster Bank* [1943] 2 All E.R. 725.

(4) *American International Assurance Co. Ltd.* v. *Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 M.L.J. 95.

ORIGINATING SUMMONS.

*Chin Yew Meng* for the chargee.

*Chelva Nayagam* for the chargor.

**Mohamed Azmi J.:** In Originating Summons No. 357 of 1968, the chargor is applying by Notice of Motion to set aside the Order of Sale dated March 3, 1969 granted by the court in respect of the charge over the land held under Certificate of Title No. 27139 for Lot 7768 Mukim of Petaling pursuant to section 256 of the National Land Code. On the other hand, in Originating Summons No. 102 of 1972, the chargee is applying under Order 54A of the Rules of the Supreme Court for a declaration as to the interpretation of the same order of the court concerning that part of the order relating to the period within which the interest at 9 per cent per annum is payable. For purpose of convenience, both applications were consolidated by consent and heard in open court.

On the face of the chargor's Notice of Motion and the affidavit in support, this application to set aside the order dated March 3, 1969 is essentially based on the ground that the order extracted is at variance with the order actually given by the judge, and as such it is null and void and so are all subsequent proceedings based on the said order. Mr. Chelva Nayagam, counsel for the chargor, makes it quite clear that the application is not to set aside the judgment of the court but is only against the order as extracted,

and it is his contention that the application is based on the inherent jurisdiction of the court and not under Order 28 Rule 11 of the Rules of the Supreme Court.

In the present case, the order dated March 3, 1969 was made in pursuance to an application by an Amended Originating Summons dated January 31, 1969 filed by the chargee for an order:

"1. that the land held under Certificate of Title No. 27139 for Lot 7768 Mukim of Petaling and charged to the Applicant under a first charge registered in the Register of Charges Presentation No. 546 Volume CLX Folio 89 be sold by public auction to satisfy the principal sum of $9,171.48 as at 17th November, 1967 together with interest thereon at the rate of 9 per cent per annum to the date of the Order of this Honourable Court and insurance premium of $28.50;

2. that the date on which the Sale shall be held be specified;

3. that the reserve price and other directions relating to the Sale be fixed by the Senior Assistant Registrar; and

4. costs to be taxed."

The Summons was heard in Chambers by Datuk Abdul Aziz J. on March 3, 1969 and His Lordship's Notes and Judgment appeared as follows:

"Miss Thoo for Applicant.

Segaram for Respondent.

Amount due as at today $10,125.08.

Order as prayed."

A draft of the court order was, as in normal practice, prepared by the chargee's solicitors and then sent to Messrs. M. Segaram & Company who were then the solicitors for the chargor, for approval. The Draft Order as approved by Messrs. M. Segaram was then sent to the court and it was accordingly perfected. Mr. Chelva Nayagam now says that the order as extracted in March 1969 is not what the court actually has ordered; and on the authority of *Macfoy* v. *United Africa Co., Ltd.*,[1] he submits that the whole formal order together with all subsequent proceedings based on the said order is a nullity. With respect, I do not think *Macfoy's* case affords much assistance to the chargor's application. There Their Lordships of the Privy Council were considering the effect of delivering a statement of claim during the court's long vacation in Sierra Leone. The appellant in that case was seeking to set aside the judgment entered against him in default of appearance and took up the point that the delivery of the statement of claim during the long vacation being in breach of the Rules of the Supreme Court was a nullity and as such the judgment in default and all subsequent proceedings were therefore void. In dismissing the appeal, the Privy Council held that such delivery was merely a voidable act and not a nullity. In the instant case, as the application is not to set aside the judgment of the court on the ground of nullity but is only against the order as extracted, I cannot see the relevancy of bringing up the question of the alleged breach of the provisions of sections 257 and 258 of the National Land Code. The Court Order has been admitted to be a regular and valid judgment. Indeed, the chargor could not say otherwise, for if the judgment was irregular he should have appealed unless it was a nullity, in which case he would be entitled *ex debito justitiae* to have it set aside. (See *Craig* v. *Kanseen*[2]).

Once an order of the court has been drawn up on the approval of counsel for both parties and perfected, as in the present case, the jurisdiction granted to the court to vary it under Order 28 Rule 11 of the Rules of the Supreme Court known as the "slip rule" is very limited. However, it is the submission of Mr. Chelva Nayagam that the application is based on the inherent jurisdiction of the court and not under Order 28 Rule 11. As to inherent jurisdiction of the court to vary its own order, *Mallal's* Supreme Court Practice has this to say at page 352:

"Apart from the rule (i.e. the slip rule), the court has an inherent power to vary its own orders so as to carry out its own meaning and to make its meaning plain. *Lawrie* v. *Lees*, 7 App. Cas. pp. 34, 35; *Milson* v. *Carter*, (1893) A.C. 640. But if the order, as drawn, correctly expresses the intention, it cannot be altered under this rule or the inherent jurisdiction even if the decision of the court is procured by fraud or misrepresentation. *Preston Banking Co.* v. *Allsup*, (1895) 1 Ch. 141, C.A. See also *Re Gist*, (1904) 1 Ch. 408; and *MacCarthy* v. *Agard*, (1933) 2 K.B. 417, C.A. The court also has jurisdiction under r.12 *infra*, at any time, and on such terms as to costs or otherwise as is just, to amend any defect or error in any proceedings."

Under its inherent jurisdiction, it seems clear that the court can only vary its own orders so that the formal order as drawn up correctly expresses the intention of the order delivered by the court. The fact that the formal order is at variance with the Court Order does not make it null and void. In my judgment, it is only an irregularity which can be cured under Order 28 Rule 11 or under the inherent jurisdiction of the court. On this ground alone, I think the chargor's application to set aside the whole formal order on the ground that it is void and a nullity should be dismissed. However, I will go further, as it is my finding that the chargor has failed to establish that the order as extracted does not correctly express the intention of the Court Order. In my view, the court's "Order as prayed" judgment is sufficiently clear to mean, *inter alia*, that all the orders applied for by the chargee under the four prayers in the Amended Originating Summons dated January 31, 1969 have been allowed. As regards the principal sum of $10,125.08 in the formal order, it is obviously based on the Judge's Notes as to the amount due from the chargor to the chargee as on March 3, 1969. Thus, although only $9,171.48 was prayed for in the Amended Originating Summons, the figure of $10,125.08 correctly expresses the intention of the Court Order. With regard to the complaint that there is no date of sale and no direction to the Senior Assistant Registrar to fix the reserve price in the formal order, at the most these are mere omissions and they can be cured under Order 28 Rule 11. In any event, the first date of sale was fixed by the Senior Assistant Registrar on September 8, 1969 which is more than one month from the Order of Sale, and therefore it is in compliance with the provisions of section 257(1)(b) of the National Land Code. It should also be noted that the sale of the chargor's property has now been postponed sine die as all attempted sales have proved to be abortive.

With regard to "interest at the rate of nine (9) per centum per annum from the 4th day of March, 1969" in the formal order, it is true that the chargee merely prayed for interest from November 17, 1967

to the date of the order, but no interest after judgment was applied for in the Amended Originating Summons. However, having considered the provisions of Order 41 Rule 11 read together with Order 20 Rule 6 of the Rules of the Supreme Court, I agree with Mr. Chin Yew Meng that no request for interest need be specifically prayed for in cases of the present nature. (See *Riches* v. *Westminster Bank, Ltd.*[3]). In my view, as the formal order had the approval of Messrs. M. Segaram & Company in March 1969 without any complaint till January 1972, on the balance of probabilities I am satisfied that an oral application must have been made in respect of interest after judgment, and the learned judge must have exercised his discretion in ordering such interest although it was not prayed for in the Summons. As regards the rate of interest, it was agreed in the charge that it should be charged and payable at the rate of nine per centum per annum. As the Court Order dated March 3, 1969 did not clearly specify for what period the interest should be chargeable, I would allow the chargee's application under Order 54A for a declaration that the rate of interest at nine (9) per centum per annum shall prevail till the date of realisation *i.e.* the date of sale. This is based on the decision of the Federal Court in *American International Assurance Co. Ltd.* v. *Union Builders (Malaysia) Sdn. Bhd.*[4] where the contractual rate of interest at 11 per cent per annum was allowed from the date of judgment until the date of sale.

I would therefore dismiss the chargor's application to set aside the formal order dated March 3, 1969 with costs; and allow the chargee's application for a declaration in terms of paragraph (a) of the Originating Summons. As both cases have been jointly heard, I make no order as to costs in respect of the chargee's application.

*Order accordingly.*

Solicitors: *Allen & Gledhill; Chelva Nayagam & Co.*

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## MALAYAN THREAD CO. SDN. BHD. v. OYAMA SHIPPING LINE LTD. & ANOR.

**[O.C.J. (Raja Azlan Shah J.) December 15, 1972]**

**[Kuala Lumpur — Civil Suit No. 1336 of 1969]**

*Contract — Bill of lading — Exemption clauses — Whether breach of fundamental term of contract — Exenoration from liability.*

*Contract — Bailment — Care to be taken by bailee — Goods delivered to godown of Port Swettenham Authority — Port Authority By-laws, 1965, r. 91(1) — Contracts (Malay States) Ordinance, 1950, s. 104.*

This was an action for damages for breach of contract or for conversion. The plaintiffs were the consignees of cotton sewing thread which were shipped on board a ship belonging to the first defendant. All the goods were unloaded at the ship's side but subsequently a case and 15 cartoons were stolen by a person or persons unknown somewhere between the ship's side and/or in shed No. 6. The first defendants would be liable for breach of contract and conversion unless there was some term in the bill of lading protecting them.

The first defendants relied on clauses 2 and 15 of the bill of lading.

Clause 2 provided that "the shipping company shall not be responsible for any consequences arising or resulting from, *inter alia*, loss by robberies, thefts or pilferages, by land or water whether by persons in the employment or service of the company or otherwise. Clause 15 provided that "In any case the company's liability shall cease as soon as the goods leave the ship's deck and/or tackle".

The Port Swettenham Authority, the second defendants, denied all liability and relied on rule 91(1) of the Port Authority By-laws 1965 which reads "The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or from any other cause, unless such loss, or destruction has been caused solely by the misconduct or negligence of the Authority or its officers or servants".

**Held:** (1) the exemption clauses in this case were wide enough to exonerate the first defendant from responsibility for the short delivery of the goods;

(2) as in the present case the loss or short delivery was caused by theft by some person or persons unknown, and the act of such person or persons could not be considered to be the act of the first defendants, there was no fundamental breach of the contract;

(3) the second defendants, as bailees, had exercised due care and diligence in keeping and preserving the goods entrusted to them and they had discharged the onus of showing that the loss of the goods in question was not due solely to their misconduct or negligence.

*Cases referred to:-*

(1) *Charted Bank of India, Australia and China* v. *British India Steam Navigation Co. Ltd.* [1901] A.C. 369.

(2) *Bontex Knitting Works Ltd.* v. *St. John's Garage* [1943] 2 All E.R. 690.

(3) *Alexander* v. *Railway Executive* [1951] 2 All E.R. 442.

(4) *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 2 All E.R. 866.

(5) *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.* [1959] M.L.J. 200, P.C.

(6) *Ashby* v. *Tolhurst* [1937] 2 All E.R. 837.

(7) *Hollins* v. *J. Davy Ltd.* [1963] 1 All E.R. 371.

(8) *Sharikat Lee Heng Seng Sdn. Bhd.* v. *Port Swettenham Authority* [1971] 2 M.L.J. 27.

(9) *Williams* v. *Carson Syndicate Ltd.* (1919) 35 T.L.R. 478.

(10) *Cheshire* v. *Bailey* [1905] 1 K.B. 237.

CIVIL SUIT.

*Low Yong Suan* for the plaintiffs.

*Joga Singh* for first defendants.

*J. Puthucheary* (*Abdullah Yusof* and *Wong Soon Wah* with him) for the second defendants.

**Raja Azlan Shah J.:** On September 18, 1968, 25 packages (10 cases 15 cartons) of cotton sewing thread were shipped on board the ship "Nansei Maru" from Kobe, Japan, and were to be delivered at Port Swettenham, the port of discharge. The shipping company, the first defendants, issued a bill of lading dated September 18, 1968 in which they acknowledged that the goods were shipped to the order of the consignee. There was noted on the bill of lading a request: "Notify party — The Malayan Thread Co. Sendirian Berhad, P.O. Box 462, Kuala Lumpur." They are the plaintiffs, the holders of the bill of lading.

On October 10, 1968 the ship *Nansei Maru* arrived at Port Swettenham. The shipowners had agents called East Season Trading Corporation. On the authority